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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

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UNITED STATES OF AMERICA
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* v. 11-cr-22-01-JD
* February 12, 2013
* 2:10 p.m.
*
JOSE REYES
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TRANSCRIPT OF SENTENCING  
BEFORE THE HONORABLE JOSEPH A. DICLERICO, JR.

Appearances:

For the Government: Donald Feith, AUSA  
U.S. Attorney's Office  
53 Pleasant Street  
Concord, NH 03301

For the Defendant: Paul J. Garrity, Esq.  
14 Londonderry Road  
Londonderry, NH 03053

Probation Officer: Jodi Gauvin

Interpreter: Jean Pepper

Court Reporter: Diane M. Churas, LCR, CRR  
Official Court Reporter  
United States District Court  
55 Pleasant Street  
Concord, NH 03301  
(603)225-1442

1                   BEFORE THE COURT

2                   (Interpreter duly sworn.)

3                   THE CLERK: Court has before it for  
4 consideration this afternoon sentencing in Criminal Case  
5 11-22-01-JD, United States of America versus Jose Reyes.

6                   THE COURT: All right. Good afternoon.

7                   ALL: Good afternoon, your Honor.

8                   THE COURT: At the last hearing we discussed  
9 several procedural matters, and one of the issues that  
10 we took up involved filing an amendment to the June 8,  
11 2012, plea agreement in order to clarify the penalties  
12 for the offenses to which Mr. Reyes has pled guilty to  
13 be sure that he understood the consequences since there  
14 was some concern and some uncertainty about the  
15 penalties as stated in the original plea agreement.

16                   The Court now has before it an amendment to  
17 the June 8th plea agreement, and that amendment has been  
18 signed by Assistant United States Attorney Donald Feith,  
19 by the defendant, Jose Reyes, his attorney, Paul  
20 Garrity, and the interpreter, Jean Pepper.

21                   Now, Mr. Reyes, the Court has this document  
22 before it, the amendment, and your signature appears on  
23 page two. Did you sign this amendment?

24                   THE DEFENDANT: Yes, sir.

25                   THE COURT: And did you review it with Mr.

1     Garritty before you signed it?

2                   THE DEFENDANT:   Yes.

3                   THE COURT:   And you had the benefit of an  
4     interpreter when you reviewed it?

5                   THE DEFENDANT:   Yes.

6                   THE COURT:   And did you sign it willingly and  
7     voluntarily?

8                   THE DEFENDANT:   Yes.

9                   THE COURT:   Now, this amendment states that if  
10    the Court finds that you are liable or responsible for  
11    less than 500 grams of cocaine, you could be subject to  
12    a maximum term of imprisonment of 20 years.  Do you  
13    understand that?

14                  THE DEFENDANT:   Yes.

15                  THE COURT:   And a maximum fine of a million  
16    dollars.  Do you understand that?

17                  THE DEFENDANT:   Yes.

18                  THE COURT:   And a term of supervised release  
19    of not less than three years and it could be as much as  
20    life.  Do you understand that?

21                  THE INTERPRETER:  I'm sorry, your Honor, could  
22    you repeat the last sentence.

23                  THE COURT:   A term of supervised release of  
24    not less than three years and it could be for as much as  
25    life.

1 THE DEFENDANT: Yes.

2 THE COURT: Now, as the agreement says, if the  
3 Court should find that you were responsible for  
4 500 grams or more of cocaine, then there is a mandatory  
5 minimum sentence of five years. Do you understand that?

6 THE DEFENDANT: Yes.

7 THE COURT: What that means is that the Court  
8 would be required to impose a sentence of at least five  
9 years. Do you understand that?

10 THE DEFENDANT: Yes.

11 THE COURT: And the maximum in those  
12 circumstances would be 20 years. Do you understand  
13 that?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: There is also a maximum fine of a  
16 million dollars and a term of supervised release of from  
17 four years to life. Do you understand that?

18 THE DEFENDANT: Yes.

19 THE COURT: Did anybody in any way force you  
20 or threaten you into signing this amendment to the plea  
21 agreement?

22 THE DEFENDANT: No.

23 THE COURT: The Court finds that Mr. Reyes has  
24 knowingly, voluntarily, and intelligently executed this  
25 amendment to the June 8, 2012, plea agreement and is

1     aware of the penalties that apply to this case depending  
2     on the determination that the Court makes with respect  
3     to drug quantities.

4             The Court has before it a Presentence  
5     Investigation Report. Have you reviewed that with your  
6     client, Mr. Garrity?

7             MR. GARRITY: I have, your Honor.

8             THE COURT: Are there any exceptions or  
9     objections you would like to take up?

10            MR. GARRITY: Yes, your Honor. In particular,  
11     we object to the drug quantities contained in the  
12     presentence report other than what was admitted to by  
13     Mr. Reyes when he entered into this plea and what's  
14     outlined in the plea agreement. And just so the Court's  
15     aware as to the basis for our objection to those parts  
16     of the report, they are outlined primarily in paragraph  
17     15 where there's talk of CI No. 3 and CI No. 4. CI No.  
18     3, I believe it's Carvajal. He's an individual who  
19     informed the government that he met Mr. Reyes in 2005  
20     when he was involved in drug dealing with Mr. Reyes from  
21     2005 until 2007, which I think the government agrees is  
22     factually impossible since Mr. Reyes was incarcerated up  
23     until November of 2006.

24            THE COURT: Now, that was in the original.

25            MR. GARRITY: It's still in mine, Judge, at

1 paragraph --

2 THE COURT: You said 15 on page six. Are we  
3 on the same paragraph and page?

4 MR. GARRITY: Paragraph 15, yes, your Honor.

5 THE COURT: And how far into it?

6 MR. GARRITY: We object to the entirety of  
7 what's contained there because it appears to be based on  
8 what CI No. 3 related to the government, who was  
9 Carvajal.

10 THE COURT: All right. He was the one that  
11 had given the prior information that was inaccurate --

12 MR. GARRITY: Right.

13 THE COURT: -- when Mr. Reyes was  
14 incarcerated.

15 MR. GARRITY: Right.

16 THE COURT: And so you're really attacking his  
17 credibility.

18 MR. GARRITY: Yes, your Honor. And there's  
19 some other reasons to doubt his credibility, but that's  
20 one of the key reasons.

21 We'd also object to what's outlined in  
22 paragraph 16. And there's talk of CI No. 4. Again, we  
23 question the credibility of CI No. 4. If my  
24 recollection is correct, CI No. 4 may be Nicole Wells  
25 who also informed the government that she met with --

1 was dealing with Mr. Reyes and was romantically involved  
2 with him beginning in 2005 and continued to do that for  
3 about a year and a half until they allegedly broke up in  
4 2007 when she became pregnant. Again, factually  
5 impossible given his incarceration status. And there's  
6 some additional reasons to doubt her credibility given  
7 the Giglio material I received.

8 CI No. 5. And if my recollection is correct,  
9 that maybe Kelly Guay. Again, we'd argue that her  
10 credibility is substantially questioned given the Giglio  
11 material I received, and in addition she was shown a  
12 photo of Mr. Reyes during a proffer and could not  
13 identify the photo of -- as Tony, the individual she  
14 claimed she was dealing with, even though the photo was  
15 that of Mr. Reyes. So we object to any of the weights  
16 outlined there.

17 In addition, Judge, we have a general argument  
18 that where these persons' credibility is really at  
19 issue -- and I know the standard of proof here is  
20 preponderance of the evidence, nevertheless it still has  
21 to be deemed reliable, and absent putting forward these  
22 witnesses so that you can evaluate their credibility and  
23 put them through cross-examination, what's outlined in a  
24 report based on these individuals' allegations shouldn't  
25 be utilized.

1                   And one further thing, too, Judge. It's  
2   really not, I guess, an objection, but maybe a  
3   clarification. In paragraph 18 there's reference right  
4   at the end where the report says: Also worthy of note  
5   is that two of Reyes's associates, Carvajal and Perez,  
6   were convicted in state court. Those were Peter and  
7   Johnny, two of the co-workers, along with Mr. Reyes.  
8   They were sentenced to 12 months imprisonment. In  
9   actuality, Judge, they were sentenced to -- I went to  
10   the state court and got the sentencing documents. Angel  
11   Perez, who I believe is Johnny, he received 12 months in  
12   the house of corrections, all but 49 days suspended. So  
13   he got 49 days. And Peter received 12 months, all but  
14   70 days suspended.

15                  I just want to make sure that's correct,  
16   Judge. (Pause.)

17                  Looks like he got 12 months, all but 70 days  
18   suspended. And, Judge, we'd also object to the  
19   probation officer's conclusion in the report that Mr.  
20   Reyes should be given an enhancement for being a manager  
21   or supervisor. We would argue to the Court that he,  
22   Peter, and Johnny were co-workers in this organization  
23   and there shouldn't be such enhancement.

24                  THE COURT: Mr. Feith, do I understand the  
25   government doesn't object to the last point?



1                   MR. FEITH: Yes, it doesn't, your Honor;  
2     that's correct.

3                   THE COURT: So that two-point adjustment will  
4     be struck then in paragraph 29 which will result in a  
5     new figure, 31, adjusted offense level of 26 at this  
6     point in time. All right.

7                   MR. FEITH: Your Honor, with respect to the  
8     drug quantity, the United States in its sentencing  
9     memorandum offered two methods of determining what it  
10    asserted were reasonable methods for asserting or  
11    determining what the drug quantity was.

12                  Mr. Reyes admitted to being involved in a drug  
13    conspiracy that spanned at least a period from  
14    January 1st, 2007, through April 28th of 2008. And  
15    during the period -- your Honor, on page five of the  
16    government's sentencing memorandum I reference the  
17    period as January 1st, 2008, through April 2008. That's  
18    supposed to be January 1st, 2007.

19                  But during the period of controlled buys as  
20    set forth in the sentencing memorandum, Mr. Reyes sold  
21    approximately 24 grams over a 24-day period. So the  
22    first method the United States offers is if the Court  
23    were to take an average of one gram per day for the  
24    848 days of the conspiracy, that would result in  
25    848 grams, well over 500. And the government submits

1     that that's an extremely conservative method of  
2     calculating it because it only relies on the purchases  
3     made by the individual identified as Confidential  
4     Informant 2. So it doesn't rely on the other  
5     confidential informants at all. And Confidential  
6     Informant 2 is the confidential informant who made the  
7     controlled buys.

8             Now, admittedly Confidential Informant 2 told  
9     law enforcement that it was involved with Mr. Reyes for  
10    approximately six months, but I think it is still fair  
11    to extrapolate based upon that particular confidential  
12    informant's purchases during the controlled buy period.

13            The other method that the United States offers  
14    as an alternative or in combination is there was a sum  
15    of money seized, \$24,880, and if you take the purchase  
16    price used in the controlled buys, 24.26 grams were  
17    purchased for \$1,700 in official funds. That yields a  
18    per gram price of \$70.07. If you take the \$24,880  
19    figure and divide it by \$70.07, that yields 355.07  
20    grams, plus a quantity of 27 grams that were seized at  
21    the time the money was seized, and that gives you  
22    382.67 grams.

23            And, your Honor, that is not 500 grams, but it  
24    is 118 grams short of 500 with a significant period of  
25    time in which you would have to conclude Mr. Reyes did

1 no drug deal in order to stay below the 500-gram figure,  
2 and I think, again, based on the investigation that was  
3 done, without taking into account anything from  
4 Confidential Informant 3 or Confidential Informant 4,  
5 the record establishes, at least during the life of this  
6 conspiracy, Mr. Reyes -- it was reasonably foreseeable  
7 to him that the quantity exceeded 500 grams.

8           So we would offer either of those methods as a  
9 reasonable and, in the government's view, an extremely  
10 conservative calculation of the drug weight in this  
11 case.

12           While we discussed the leadership role, your  
13 Honor, the government does not object to it, and in any  
14 event, given Mr. Reyes's career offender status, it  
15 doesn't affect the career offender calculation.

16           THE COURT: Thank you.

17           MR. GARRITY: Your Honor, with respect to the  
18 first method of calculation, the government proposed  
19 utilizing CI No. 2 in the controlled buys, and the  
20 stipulated facts in the plea agreement that Mr. Reyes  
21 was dealing with CI No. 2 for a period of six months, I  
22 think I would agree with the government. If there had  
23 been any indication by CI No. 2 as laid out in the  
24 stipulated facts in the plea agreement that we were  
25 dealing in X amounts on an average basis during these

1 two to three times he would meet with Mr. Reyes, I would  
2 submit it's pure speculation as to the amounts being  
3 dealt with and the times for the controlled buys.  
4 There's no indication at all that those sales were a  
5 typical amount sold over the six months, no indication  
6 that he was buying one gram as opposed to a quarter gram  
7 or any type of figure. So the government's asking you  
8 to engage in pure speculation utilizing that method.

9           And with method number two, using the money  
10 and the controlled buys, I think the First Circuit said  
11 you can use the money. You can use that to translate it  
12 into a drug amount. Nevertheless, it still doesn't get  
13 them to 500. It gets them to a little over 400, and,  
14 again, they are asking you to engage in speculation that  
15 there was dealing going on in these other time periods  
16 and that it was in an amount that could get it over 500.  
17 Absent putting forward these people saying here's what  
18 we were doing, here's what we do on a typical sale over  
19 X amount of weeks or months I would argue is pure  
20 speculation in terms of whether or not Mr. Reyes was  
21 engaged in dealing over 500 grams.

22           In some ways the government's methodology  
23 makes some sense, but without a foundation with method  
24 number one in terms of the amounts, it's a pure guess.  
25 With methodology number two, it leaves them well short

1 and again asks you to engage in speculation in terms of  
2 what he was doing on these other occasions prior to the  
3 six months outlined by CI No. 2. So we would object to  
4 the 500 grams.

5 THE COURT: The historical data has to be  
6 treated cautiously, particularly when there isn't any  
7 testimony before the Court as such.

8 The Court finds that the second method of  
9 calculating quantity is more reliable because we have  
10 hard facts, and if the Court takes that second method as  
11 suggested by the government of the cash seized and then  
12 gives a very conservative reliance on historical data,  
13 the Court can find with confidence that the defendant is  
14 responsible for at least 400 but less than 500.

15 That being the case, in paragraph 26 the base  
16 offense level would be 24. Is that correct?

17 MS. GAUVIN: I'm going to check right now for  
18 your Honor.

19 (Pause.)

20 MS. GAUVIN: Your Honor is correct. It would  
21 be Offense Level 24 for at least 400 grams of cocaine  
22 but less than 500 grams of cocaine.

23 THE COURT: Right. So paragraph 26 would be  
24 changed from 26 to 24, and paragraph 31 would be changed  
25 from 26 to 24.

1                   And under the amendment to the plea agreement  
2           which was filed today, because the Court has found the  
3           defendant is liable for less than 500, the maximum term  
4           of imprisonment would be 20 years, maximum fine of one  
5           million, supervised release not less than three, not  
6           more than one.

7                   Anything else with respect to the report, Mr.  
8           Garritty?

9                   MR. GARRITY: Yes, your Honor. Again, it's I  
10          guess not in the manner of an objection. I was able to  
11          finally get the drug certifications from Attorney Annino  
12          that's led to a couple of continuances here. I showed  
13          those to the government, and I have the associated  
14          police report with that. The drug certification has a  
15          name on it, Louis Aceudo, A-C-E-U-D-O, and it has an  
16          amount of 619 glassine bags, and there's some associated  
17          reports with it that have some additional amounts, 112  
18          glassine bags on one report and it looks like there's  
19          four or five drug certifications attached to it. None  
20          of them are Dookhan certifications. The police report I  
21          have has Mr. Reyes's name on it, an individual by the  
22          name of Mr. Sanchez, an individual by the name of  
23          Antonio Lopez, and then there's another name in here,  
24          Acevedo, A-C-E-V-E-D-O. Wasn't until Mr. Feith pointed  
25          out that perhaps the Acevedo that's on the drug

1 certification may be Acevedo. I thought there might be  
2 some sort of connection. When I got these reports from  
3 Attorney Annino it looks like they may not have been  
4 connected with that conviction.

5 And all of that is a long-winded argument for  
6 perhaps leaving Mr. Reyes with the ability to file a  
7 2255 if it turns out that the drug certifications I got  
8 from Mr. Annino turn out not to be the correct drug  
9 certifications. And I think the government doesn't  
10 object to this.

11 MR. FEITH: I mean, your Honor, he has  
12 whatever rights he has to file a 2255. I understand and  
13 I've discussed with Attorney Garrity that the Court --  
14 and I had conversations with Deputy Clerk Lynch last  
15 week along with a representative of the Federal  
16 Defender's Office and Deputy Chief Battistelli as well  
17 as Kevin Lavigne about a type of standing order that's  
18 going to come out on the hidden laboratory cases. Part  
19 of that order addresses 2255 issues, whatever rights Mr.  
20 Reyes has. We're not seeking to abridge those in any  
21 way. I discussed with Mr. Garrity that this lab report  
22 is not from the hidden lab, so unless there's some  
23 expansion of the current allegations to other  
24 facilities, but whatever rights he has, he has and we're  
25 not seeking to abridge those in any way.

1           THE COURT: Yes. And if more information  
2 becomes available in the future that indicates that  
3 these underlying convictions, that there is a problem  
4 with them, either they are going to be voided or  
5 annulled or overturned or whatever, dismissed, then of  
6 course he can come back and seek relief in terms of his  
7 sentence, a 2255.

8           MR. GARRITY: Thank you, your Honor. One  
9 other issue, Judge. I discussed this with Ms. Gauvin.  
10 It's in paragraph 40. It's on page 11.

11          THE COURT: Yes.

12          MR. GARRITY: And there is reference there to  
13 possession with intent to distribute Class A heroin and  
14 I think in Docket No. 9802CR7200A, B, and C where,  
15 again, there's reference to possession with the intent  
16 to distribute. And there's an associated sentence with  
17 at least Count 1 and 2. Attorney Lazar -- he was the  
18 attorney that went into Roxbury District Court to try to  
19 vacate those priors. He filed his motion. That motion  
20 was not successful. But the Court issued a decision in  
21 denying the motion, and I showed this to Ms. Gauvin.

22                 In footnote two, the Court indicated that  
23 Docket No. 9802CR7200 was dismissed. Maybe I misread  
24 the PSR report, but it appears that 9802CR7200 was  
25 dismissed in its entirety, and Mr. Reyes was convicted



1     only of distribution -- or possession with intent to  
2     distribute cocaine. And the police report associated  
3     with that shows it was a small hand-to-hand distribution  
4     of \$40 worth of cocaine.

5             THE COURT: You're talking about paragraph 40.

6             THE DEFENDANT: Yes, your Honor.

7             THE COURT: I don't understand anything you've  
8     said.

9             MR. GARRITY: There's talk about heroin in the  
10    report, Judge, at paragraph 40. But it appears that any  
11    charge associated with that was dismissed and what Mr.  
12    Reyes was convicted of was cocaine distribution and that  
13    was --

14            THE COURT: Well, talk about what's listed  
15    here so that I know what you are talking about, because  
16    I don't have the documents you're referring to.

17            MR. GARRITY: Paragraph 45, Count 1 being  
18    possession.

19            THE COURT: Yes, possession Class A substance  
20    Class A substance heroin with intent to distribute,  
21    you're saying that was dismissed. Is that right?

22            MR. GARRITY: Yes, your Honor.

23            THE COURT: Do you agree?

24            MS. GAUVIN: Your Honor, if you look in the  
25    narrative section under that, the docket number that

1 Attorney Garrity is talking about, 987200, was dismissed  
2 and it was replaced with the docket that lists the  
3 counts that are set forth in the report.

4 THE COURT: Give me the bottom line. Which of  
5 these offenses is left? That's all I care about.

6 MR. GARRITY: He was convicted of Counts 1 and  
7 2 in paragraph 40, possession of Class A substance  
8 heroin and possession of Class B substance cocaine.

9 THE COURT: The others are gone.

10 MS. GAUVIN: Correct. Counsel's referring to  
11 a completely separate docket number, which I discussed  
12 later, that charged the same offenses but was dismissed.

13 THE COURT: So 1 and 2 are there, remain.  
14 Three is gone.

15 MS. GAUVIN: Yes, 3 and 4 were dismissed.

16 THE COURT: Three and four were dismissed, all  
17 right.

18 MR. GARRITY: Judge, just so it's clear --

19 THE COURT: That doesn't change the three  
20 points, does it?

21 MS. GAUVIN: No. What Attorney Garrity is  
22 referring to is that there was a case filed in that  
23 court before the defendant pled guilty to those  
24 offenses. And my paperwork, my court records, say that  
25 he was charged the same way. The case was dismissed and

1 then they replaced it with the charges that he's been  
2 convicted of. He's alleging that they took away any  
3 conviction of heroin, and that's not what my court  
4 records say.

5 MR. GARRITY: In effect, that's my argument,  
6 Judge. The heroin matters were dismissed. He was  
7 convicted --

8 THE COURT: Not 1 and 2 though. 1 and 2,  
9 possession of Class A heroin with intent to distribute.  
10 Right? Paragraph two, possession of Class B cocaine with  
11 intent to distribute. You say no?

12 MR. GARRITY: I say no, Judge, and I say that  
13 based on the charging document that's associated with  
14 the sentence he got 18 months, which was on and after  
15 six months for a prior matter that he was on probation  
16 for, and the documents from Roxbury District Court bear  
17 that out. There was only one count that he was  
18 convicted of and that was on February 8th of 1999.

19 I'm not arguing that that doesn't constitute a  
20 predicate, but I think the facts associated with a  
21 predicate are irrelevant for a variance argument if one  
22 count was cocaine Class B and that was 18 months house  
23 of corrections from and after a prior matter that he was  
24 on probation for where he got six months. So my  
25 argument is that the heroin matter was dismissed in its

1 entirety as is reflected in the order issued by the  
2 Court out of Roxbury District Court associated with  
3 Attorney Lazar's motion.

4 THE COURT: I don't know because I don't have  
5 that record before me. Do you know what he's talking  
6 about?

7 MR. FEITH: Today's the first I've heard of  
8 it, your Honor, so I don't know. As I understood it, I  
9 understood it the same way Probation Officer Gauvin did,  
10 which is the documents that Attorney Garrity has refer  
11 to what is the original docket number which in fact was  
12 dismissed, but it's replaced with the docket number that  
13 the court sees in paragraph 40, 9902CR738A, B, C, D, and  
14 the disposition of those charges is as set forth in  
15 paragraph 40.

16 MR. GARRITY: Your Honor, may I approach?

17 THE COURT: I will take a recess to look over  
18 these documents.

19 MR. GARRITY: Judge, the first one, those are  
20 the documents from the Roxbury District Court.

21 THE COURT: This really all should have been  
22 brought out in the memorandum ahead of time.

23 (Brief recess taken.)

24 THE COURT: All right. I looked through the  
25 memorandum decision from the Massachusetts court that

1     you provided and the records and it's clear that 7200  
2     was dismissed. A new complaint was filed. That was  
3     738, and that's reflected in paragraph 40, paragraphs 1,  
4     2, 3, and 4, and the defendant pled guilty to 1 and 2,  
5     and 3 and 4 were dismissed. So that's the situation.

6             And, by the way, it's clear, Ms. Gauvin showed  
7     me the records, that paragraph one related to heroin and  
8     paragraph two related to cocaine.

9             MR. GARRITY: And Ms. Gauvin showed those  
10    records to me. I didn't have those.

11            THE COURT: Okay. So I'm returning those  
12    documents to you that you provided.

13            MR. GARRITY: Thank you.

14            THE COURT: All right. Anything else?

15            MR. GARRITY: No, your Honor.

16            THE COURT: Then the Court accepts the factual  
17    findings in the Presentence Investigation Report with  
18    the exception of quantity which the Court has made an  
19    independent determination on, and the Court has also  
20    noted changes in the offense level computation as  
21    previously noted on the record.

22            MS. GAUVIN: Excuse me, your Honor. And the  
23    Court also did not find an aggravating role, so that two  
24    levels will also be taken off the report.

25            THE COURT: Yes. I already did that. Yes. I

1 believe I did. I referred to paragraph 26. That is now  
2 24 and paragraph 31 is now 24.

3 So the total offense level because of the  
4 career offender status is 30, a criminal history  
5 category of VI. That yields a guideline range of 168 to  
6 210 months. Do you agree?

7 MR. FEITH: Yes, your Honor.

8 MR. GARRITY: Judge, there's one further issue  
9 in terms of whether he was entitled to the third level  
10 for acceptance. I think we addressed this in the  
11 September hearing, that it was our position that  
12 contractually under the plea agreement the government  
13 was obligated to follow through with the third level.  
14 That's our position, Judge.

15 THE COURT: All right.

16 MR. FEITH: Your Honor, I think the plea  
17 agreement contains the standard language as to  
18 acceptance of responsibility and does not contractually  
19 bind the United States to that third level. It is  
20 conditional on the defendant having assisted in the  
21 investigation or prosecution of the defendant's own  
22 misconduct by timely notifying the United States of the  
23 intention to enter a plea, and as I recall the record,  
24 this plea was done within a few days of jury selection  
25 after an exhibit list had been filed by the United

1 States, and that doesn't fall under the timely  
2 notification provisions. The PSR report of a two-level  
3 adjustment for acceptance is correct in the government's  
4 view.

5 MR. GARRITY: Judge, it would be our position  
6 that given the language of the plea agreement along with  
7 the stipulated cap for sentencing, 151, it would not  
8 make sense given the 151 cap that the government would  
9 be taking a contrary position that he doesn't get the  
10 third level. At the time he entered the plea, I think  
11 everyone was of the understanding that he was going to  
12 get the third level, and the 151 only makes sense in  
13 that context. So we would argue that the government is  
14 contractually bound to move for the third level, third  
15 point.

16 MR. FEITH: Well, your Honor, I mean, I  
17 understand that this plea agreement was put together  
18 sort of in a rush, at least that's my understanding from  
19 reviewing the file, but the language just doesn't do  
20 what Attorney Garrity says it does. The 151 number  
21 frankly, your Honor, is really from whole cloth if you  
22 look at the factual situation at the time of the plea.  
23 Mr. Reyes's exposure based on the 851s that were filed  
24 at the time, and I understand the Court's ruling on  
25 that, was much, much higher than 151. So whatever the

1 reasoning was as to the 151 -- and the United States is  
2 going to abide by that number, your Honor. We're going  
3 to argue for that number. I don't think the record  
4 pinpoints it to an acceptance decision. There was much  
5 more going on in this case at that time, and indeed as  
6 reflected in the first PSR, the weights that at that  
7 time the United States was advocating and provided  
8 information to probation established penalties far  
9 exceeding the 151 number.

10 So I just -- I don't think the record can be  
11 read fairly to say that that was a determinative factor  
12 for the 151. Frankly because I wasn't -- it wasn't  
13 submitted for approval, I can't tell the Court how the  
14 151 number was contrived. What I can tell the Court is  
15 that there were many, many more things going on, I think  
16 as the Court is well aware.

17 THE COURT: All right. Thank you. The Court  
18 will stand by its original decision to only allocate the  
19 two levels for acceptance of responsibility, and as I  
20 stated previously, that results in a total offense level  
21 of 30, criminal history category of VI, a guideline  
22 range of 168 to 210. Does the government have a  
23 recommendation?

24 MR. FEITH: It does, your Honor. For the  
25 reasons stated in its sentencing memorandum, the United



1 States asks the Court to impose a sentence of  
2 151 months. I think the driving argument behind the  
3 United States's recommendation is Mr. Reyes's  
4 recidivism. He was given sort of incremental  
5 punishment. His record of incarceration starts fairly  
6 low at six months. Then there's an 18-month sentence,  
7 resulting in 24 months of incarceration, and then  
8 there's a five-year sentence, and almost immediately  
9 upon his release -- and I think this is corroborated by  
10 the information at paragraph 58 of the PSR saying that  
11 upon his release he didn't have any legitimate  
12 employment. He resorted to drug dealing to support --  
13 or he intimated to probation that he was only drug  
14 dealing to support himself and his habit.

15           So he clearly, even after a 60-year -- which  
16 is an appreciable amount of time to spend  
17 incarcerated -- returned to a -- not 60 years, excuse  
18 me, 60-month sentence -- returned to criminal activity.  
19 So the driving force behind the government's  
20 recommendation is that he will not be deterred, your  
21 Honor. It's the United States' view that no matter what  
22 number the Court gives him he will not be deterred, but  
23 the public needs to be protected because there is a  
24 pattern here of returning to criminal conduct and  
25 specifically drug dealing.

1 THE COURT: Thank you. Mr. Garrity?

2 MR. GARRITY: Your Honor, as our sentencing  
3 memo asks for, we are arguing that an 84-month sentence  
4 is a reasonable and appropriate sentence in this case,  
5 and I say that for a couple of reasons. One, as the PSR  
6 outlines, Mr. Reyes's upbringing was awful, and I'd  
7 argue outside the range of even a lot of defendants who  
8 come before this Court who I say to a great extent do  
9 have awful upbringings.

10 But his was particularly bad in that his  
11 parents were addicts themselves, and then they  
12 prostituted Mr. Reyes at an extremely young age to feed  
13 their own addictions. From 11 to 15 he was prostituted  
14 on the streets of Puerto Rico. He then left his family  
15 home when he was 15. He himself became an addict to a  
16 number of substances. As the PSR indicates, he's been  
17 an addict since then. But given the role models he had  
18 as parents who were so bad they were willing to  
19 prostitute him, it's not all that surprising. It  
20 doesn't explain away what he did in his later years, but  
21 it places in context this is not someone who came from a  
22 great upbringing and all of a sudden turns to drug  
23 dealing.

24 A lot of these drug deals that he engaged in  
25 were to feed his own addiction. I think he had one

1 short-lived drug treatment. I think it was a couple  
2 weeks in 1998, but he's never had substantial drug  
3 treatment, even when he was incarcerated for five years  
4 in Massachusetts.

5           And I understand that the public has to be  
6 protected. I think if you look at his record without  
7 knowing his upbringing, maybe it makes sense to send him  
8 away for a long time, but I think given his upbringing  
9 it shows that the sentence the government's argued for  
10 is way over the top, especially even how he's conducted  
11 himself while he's been incarcerated at Strafford  
12 County.

13           For the first time in his life I think he's  
14 taken meaningful steps to get his life, even given his  
15 age, on the right track. He's obtained his GED. He's a  
16 trustee at the jail. He has no disciplinary problems at  
17 the jail. He's completed the life skills course,  
18 computing course, drug and alcohol program at the house  
19 of corrections. They don't offer much, but he's engaged  
20 in every program they have over there as a way to better  
21 himself. And the GED is I think a huge step for Jose  
22 given his educational background and his lack of  
23 employment and lack of employment skills that along with  
24 his addiction led him to being engaged in this sort of  
25 activity.

1                   And if you look at the sentences his  
2   co-defendants got, who the government appears to agree  
3   were equal co-workers, one gets 49 days and one gets  
4   70 days? I'm not going to stand before you and say that  
5   they have the same sort of background that Mr. Reyes  
6   has. They don't have the same sort of record most  
7   likely that Mr. Reyes has, and he certainly should be  
8   punished because of his prior record, but that extent of  
9   a disparity given that they were fully engaged in the  
10  same sort of activity?

11                  And it's my understanding that those two  
12  people at least were looked at by the U.S. Attorney's  
13  Office up here and they deferred prosecution to the  
14  state courts. So it's not as if the government wasn't  
15  aware of them, and they get those sentences and they  
16  want to send Mr. Reyes away for 151 months? I think  
17  there has to be some -- at least some relative  
18  similarity in sentencing given the sort of conduct they  
19  were all engaged in. Certainly he warrants more given  
20  his record, but not to the extent the government's  
21  asking for.

22                  And, Judge, he is a relatively older man.  
23  He's now in his early to mid-fifties. He's got a number  
24  of health problems. Even under a sentence we're  
25  proposing he's going to be close to 60 years old when

1 he's released. I think the statistics are pretty clear  
2 that at that age recidivism rates drop substantially. I  
3 know his record may not bear that out, but I think the  
4 steps he's taken at the jail to better himself along  
5 with those statistics of a lower recidivism rate  
6 indicate that the sentence we're asking for is more than  
7 reasonable. It's a lengthy period of incarceration.  
8 It's not a slap on the wrist. It takes into account  
9 what his co-defendants got to some extent, takes into  
10 account his prior record, takes into account his  
11 upbringing and his background, takes into account his  
12 addiction. And I think the 500-hour drug program, if  
13 recommended, would also deal with that as well, could  
14 help Jose to stay on the right track when he gets out.  
15 But 151-month sentence, Judge, I think is unreasonable.  
16 And I know he has these prior convictions. They're  
17 relatively old. They are for relatively small amounts,  
18 not massive amounts.

19           There's no guns involved with Mr. Reyes. I  
20 don't think any of the reports I've seen indicate that  
21 he's ever possessed a weapon, ever engaged in violence  
22 during these drug activities. So he's not I think in  
23 the high end category of drug dealing which warrants a  
24 career offender type of sentence, especially given his  
25 background and especially given what he's done to try to

1 better himself.

2 So we would ask for the 84-month sentence  
3 along with a recommendation of the 500-hour drug  
4 program. And, your Honor, I think Mr. Reyes would like  
5 to address the Court.

6 THE COURT: Yes. Mr. Reyes?

7 MR. GARRITY: Judge, one further thing, the  
8 letter he wrote to the Court that's attached to the PSR  
9 I think speaks, I guess, eloquently about how Mr. Reyes  
10 views his conduct and how he's finally realized that  
11 what he did was wrong and now he wants to get on the  
12 right track, but he would like to address the Court.

13 THE COURT: Yes, of course. Mr. Reyes.

14 THE DEFENDANT: I'd like you to read this  
15 letter to the judge. Your Honor, first I would like to  
16 say that I'm sincerely sorry for the actions that my  
17 drug use has caused. I hope that this honorable court  
18 understands that I've been a drug addict for many years  
19 and really want help stopping my use. Since I've been  
20 sober I can see all that I was doing wrong and are able  
21 to feel regret. When I was under the influence of drugs  
22 I could not properly feel or see clearly to make good  
23 decisions. This has equaled me making bad decisions for  
24 most of my life. Sure, it is easy to say you should  
25 have thought about that sooner, but it's not like that

1 for a drug addict. Unless someone intervenes on your  
2 behalf or you get arrested, you will most likely die  
3 knowing that you need help but never thinking clear  
4 enough to get it. I'm begging the mercy of this  
5 honorable court with hopes that I may receive leniency.  
6 I understand what I did and know there must be  
7 consequences for this. But please understand that I did  
8 what I did to support my habit and not out of criminal  
9 intent. I am old, sick, and alone in this world. I  
10 have no family or friends to help support me, and that  
11 means this honorable court is all I have to rely on for  
12 help. Even though I am in the career criminal category,  
13 please do not throw away the rest of my life in prison  
14 without ever having gotten the chance to get help. I've  
15 been going to school and attending rehabilitative  
16 classes since I've been incarcerated, learning about the  
17 drug and how to overcome my addiction. I believe that  
18 given the chance I can be rehabilitated and be a  
19 productive member of society. In conclusion, I beg the  
20 mercy of this honorable court and ask that you see that  
21 I need help, and if it be within the power of this  
22 honorable court to grant such, please help me. I  
23 sincerely apologize for the crimes that I've committed  
24 against the people of the United States, the government,  
25 and this honorable court. Thank you.

1 THE COURT: Thank you.

2 MR. GARRITY: Your Honor, I apologize, one  
3 further thing and I overlooked this. Mr. Reyes after  
4 his plea did attempt to cooperate with the government.  
5 He provided a proffer to the government in early July,  
6 and I know Mr. Feith has not or will not file a 5K1  
7 motion, but it is an issue I think that the First  
8 Circuit has said the Court can take into account when  
9 dealing with a variance argument.

10 At the time the government at least implied  
11 that there would be a 5K1 motion. Mr. Feith I  
12 understand has taken the position that they will not  
13 file one.

14 THE COURT: He made a proffer with whom, do  
15 you know?

16 MR. GARRITY: Yes, with Ms. Ollila and  
17 Detective Brian LaValley. And that was on July 9th of  
18 this year.

19 I can represent to the Court it was not going  
20 to be a huge 5K1, but there was an implied promise that  
21 there was going to be a 5K1. I think the First Circuit  
22 has recently addressed this issue in --

23 THE COURT: Yes, I remember reading that case.

24 MR. GARRITY: Thank you, your Honor.

25 (Pause.)



1                   THE COURT: Please stand, Mr. Reyes. The  
2 Court will read the sentence, and if either counsel has  
3 a legal objection, you can tell me what that is when I  
4 finish.

5                   Pursuant to the Sentencing Reform Act of 1984,  
6 it is the judgment of the Court that the defendant, Jose  
7 Reyes, is hereby committed to the custody of the Bureau  
8 of Prisons to be imprisoned for a term of 120 months.  
9 This term consists of 120 months on each of Counts 1  
10 through 4, all such terms to be served concurrently.

11                  It is recommended to the Bureau of Prisons  
12 that the defendant participate in the Intensive Drug  
13 Education and Treatment Program.

14                  Upon release from imprisonment the defendant  
15 shall be placed on supervised release for a term of four  
16 years. This term consists of four years on Count 1 and  
17 three years on each of Counts 2, 3, and 4, all such  
18 terms to run concurrently.

19                  Within 72 hours of release from the custody of  
20 the Bureau of Prisons, the defendant shall report in  
21 person to the probation office in the district to which  
22 he is released. While on supervised release the  
23 defendant shall not commit another federal, state, or  
24 local crime, shall comply with the standard conditions  
25 that have been adopted by this Court, and shall comply

1 with the following additional conditions:

2 One, he shall not illegally possess a  
3 controlled substance.

4 Two, he shall not possess a firearm,  
5 destructive device, or any other dangerous weapon.

6 Three, pursuant to law he shall submit to DNA  
7 collection while incarcerated in the Bureau of Prisons  
8 or at the direction of the probation office.

9 Four, he shall refrain from any unlawful use  
10 of a controlled substance. He shall submit to one drug  
11 test within 15 days of placement on probation and at  
12 least two periodic drug tests thereafter, not to exceed  
13 72 drug tests per year of supervision.

14 Five, the defendant shall pay any financial  
15 penalty that is imposed by this judgment and that  
16 remains unpaid at the commencement of the term of  
17 supervised release.

18 In addition, the defendant shall comply with  
19 the following special conditions:

20 One, as directed by the probation officer, he  
21 shall participate in a program approved by the United  
22 States Probation Office for treatment of narcotic  
23 addiction or drug or alcohol dependency which will  
24 include testing for the detection of substance use or  
25 abuse. He shall also abstain from the use of alcoholic

1 beverages and/or all other intoxicants during and after  
2 the course of treatment. He shall pay for the cost of  
3 treatment to the extent he is able as determined by the  
4 probation officer.

5 Two, he shall submit his person, residence,  
6 office, or vehicle to a search conducted by a U.S.  
7 probation officer at a reasonable time and in a  
8 reasonable manner based upon reasonable suspicion that  
9 contraband or evidence of a violation of a condition of  
10 release may exist. Failure to submit to a search may be  
11 grounds for revocation. The defendant shall warn any  
12 other residents that the premises may be subject to  
13 searches pursuant to this condition.

14 The defendant is ordered to pay a special  
15 assessment of \$400 which shall be due in full  
16 immediately. The Court finds that the defendant does  
17 not have the ability to pay a fine and waives the fine  
18 in this case.

19 The defendant is remanded to the custody of  
20 the United States Marshal.

21 Does the government have any legal objection  
22 to the sentence?

23 MR. FEITH: It does not, your Honor. Thank  
24 you.

25 THE COURT: Any legal objection?

1 MR. GARRITY: No, your Honor.

2 THE COURT: It's my obligation to inform you,  
3 Mr. Reyes, that to the extent that there are any issues  
4 that can be appealed, you do have the right to appeal  
5 this sentence to the First Circuit Court of Appeals in  
6 Boston. That appeal must be taken within 14 days of  
7 when judgment is entered, and if you cannot afford the  
8 costs of an appeal or an attorney on appeal, then those  
9 will be provided for you.

10 In imposing this sentence the Court has  
11 weighed and considered the sentencing range under the  
12 advisory guidelines, the policies underlying those  
13 guidelines, and all of the various sentencing factors  
14 set forth in Section 3553(a), and in particular, the  
15 Court has imposed this sentence for the following  
16 reasons.

17 Number one, the Court has considered the  
18 government's recommendation of 151 months and the  
19 defendant's recommendation of 84 months. The Court has  
20 also considered the stipulation entered into by the  
21 government and the defendant pursuant to Federal Rule of  
22 Criminal Procedure 11(c)(1)(C) that the defendant not be  
23 sentenced to a term of imprisonment greater than  
24 151 months. The Court has accepted this binding  
25 stipulation.

1           Two, a conspiracy to distribute cocaine and  
2     the distribution of cocaine are serious offenses due to  
3     the very addictive nature of the drug and in this  
4     instance given the amounts involved. Therefore a  
5     sentence of imprisonment of appropriate length is  
6     necessary to punish the defendant for these offenses, to  
7     deter him and others from committing similar offenses,  
8     and to promote respect for the law.

9           Three, the defendant has a criminal history  
10    category of VI and also qualifies as a career offender.  
11    He has a history of drug trafficking. The Court  
12    considers him to be a high risk for recidivism.

13          Four, the defendant has a protracted problem  
14    with substance abuse and has had a minimal employment  
15    history, and he had a very difficult upbringing and  
16    currently has health problems. He has obtained a GED  
17    while incarcerated and participated in AA meetings. He  
18    also made a proffer with the government in July of 2012.

19          Five, the sentence imposed is sufficient but  
20    not more than necessary to punish the defendant for  
21    these offenses, to deter him and others from committing  
22    similar offenses, to promote respect for the law, to  
23    protect society, and to take into account the  
24    defendant's individual characteristics.

25          Court will be in recess.

1 (Adjourned at 3:35 p.m.)

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I, Diane M. Churas, do hereby certify that the

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foregoing transcript is a true and accurate

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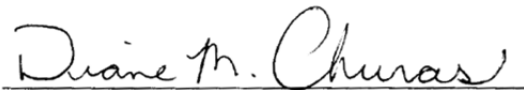
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my knowledge, skill, ability and belief.

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Submitted: 5/20/13



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**DIANE M. CHURAS, LCR, RPR, CRR**  
LICENSED COURT REPORTER, NO. 16  
STATE OF NEW HAMPSHIRE

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